87-1399

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

WELDON L. WADE,
Petitioner,

vs.

UNITED STATES DEPARTMENT
OF JUSTICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether the discharge of a federal employee for alleged misconduct which did not occur on duty was in compliance with the statutory provision (5 U.S.C. § 7513). That such conduct affected the efficiency of the service; and whether the use of allegations of misconduct which were known but not asserted until five (5) years later violated due process of law as guaranteed by the Fifth Amendment to the United States Constitution requiring reversal of Petitioner's dismissal.

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No.

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WELDON L. WADE,
Petitioner,

vs.

UNITED STATES DEPARTMENT
OF JUSTICE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OPINIONS BELOW

Petitioner seeks review of the decision of the United States Court of Appeals for the Federal Circuit (No. 87-3270). The opinion and judgment was decided and filed on November 23, 1987. Said opinion is not reported. The judgment of the Court of Appeals for the Federal Circuit affirmed the decision of the Merit Systems Protection Board issued on May 7, 1986 (No. SL07528610232).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on November 23, 1987, affirming the decision of the Merit Systems Protection Board.

This Petition is filed within ninety (90) days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c). The Court of Appeals for the Federal Circuit had jurisdiction pursuant to 5 U.S.C. § 7703. The Merit Systems Protection Board had jurisdiction pursuant to 5 U.S.C. §§ 7513 and 7701.

Constitutional provisions involved Amendment V, The United States Constitution: No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTE INVOLVED

5 U.S.C. § 7513

(a) Under regulation prescribed by the Office of Personnel Management an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

STATEMENT OF THE CASE

On February 10, 1986, Petitioner was removed from his position as correctional officer at the Medical Center for Federal Prisoners in Springfield, Missouri. The reasons specified for the dismissal were:

1. While employed at the Ellis Fischel State Hospital Petitioner had given an unauthorized and unconsented rub-down to a female patient;

2. That Petitioner had put untrue information on his application for employment or had left information blank;

3. That Petitioner omitted income when making a back pay claim against the Department of Justice;

4. That while employed at the Medical Center for Federal Prisoners in 1979, Petitioner while off duty, had made advances toward two female employees; that while on duty in 1979 he had given a female employee a bear hug.

These allegations were denied by Petitioner and an appeal was taken to the Merit Systems Protection Board. At the administrative hearing, both Petitioner and Respondent presented evidence. The Merit Systems Protection Board affirmed Petitioner's dismissal, finding the allegations were true. Petitioner timely appealed the decision to the Court of Appeals for the Federal Circuit. Petitioner argued on appeal that in dismissing him, such was arbitrary and capricious and without cause because there was no showing that the alleged grounds for discharge affected his ability to accomplish his duties or affected the efficiency of the Department of Justice. Further, Petitioner argued that

the allegations of misconduct which occurred in 1979 should have been barred by the doctrine of laches. The Court of Appeals found that the action of Respondent in discharging Petitioner was justified in that the alleged misconduct affected Petitioner's ability to accomplish his duties and affected the efficiency of the Department of Justice. The Court of Appeals further found that the decision of the Merit Systems Protection Board was not arbitrary, capricious, and abuse of discretion and in compliance with law and supported by substantial evidence. Petitioner did not file a Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of other Courts of Appeals regarding whether the alleged misconduct of Petitioner affected the efficiency of the Department of Justice so as to justify dismissal. In the alternative, the decision below decided an important question of federal law which has not been, but should be, settled by this Court.

I. The Decision Below Conflicts With the Decisions of Other Courts of Appeals.

5 U.S.C. § 7513 authorizes the removal of a federal employee only for such cause as will promote the efficiency of the service. The Court of Appeals for the Federal Circuit held in its opinion that the Respondent had shown a sufficient connection between Petitioner's alleged misconduct and the efficiency of the Department of Justice, even though all but one incident of alleged misconduct took place while Petitioner was off duty or on leave while appealing two prior dismissals by the

Department of Justice. The only allegation against Petitioner while he was on duty was that he had given a female employee a bear hug in 1979. The allegations against Petitioner for the most part (exception leaving off information of an employment application to another employer and failing to report that he had worked off a $160.00 bar tab and training bill) dealt with alleged sexual advances toward females. Respondent had characterized these as abuse of weaker individuals under the control of Petitioner in order to establish a nexus between the alleged misconduct and Petitioner's job as a corrections officer. This connection was affirmed by the Court of Appeals. Other Courts of Appeals have held so-called immoral conduct must be shown to affect occupational competence or fitness. These courts have held that similar allegations do not affect occupational competence or fitness. *Norton v. Macy,* 417 F2d 1161, 1167 (D.C. App. 1969) (alleged homosexual advances); *Scott v. Macy,* 121 U.S. App. D.C. 205, 208, 349 F2d 182, 185 (1965) (immoral conduct); *Gayer v. Schlesinger,* 160 U.S. App. D.C. 172, 180, 183, 490 F2d 740, 748-51 (D.C. App. 1973) (homosexuality); *Phillips v. Bergland,* 586 F2d 1007 (Ct.App. 4th Cir. 1978) (assault of fellow employee).

Petitioner is aware that in order to overturn the decision of the Merit Systems Protection Board he must have shown that its decision in upholding the decision of the Department of Justice in discharging Petitioner was abritrary, capricious and an abuse of discretion and not supported by substantial evidence or not in accordance with law. 5 U.S.C. § 7703. However, the Merit Systems Protection Board and the Court of Appeals for the Federal Circuit

permitted the Respondent to equate the alleged conduct of Petitioner toward females to how he would or had acted with male prisoners. Neither tribunal took into consideration Petitioner's 20 years of good employment record and the fact that the Respondent had on two prior occasions wrongfully discharged Petitioner. Instead, they upheld his dismissal holding that the action of Respondent was not arbitrary or an abuse of discretion. Petitioner had either denied or explained his actions, but his testimony was ignored as not being credible.

The fact that most of the allegations against Petitioner involved off duty conduct has been held by courts to require a greater burden in showing that this conduct affected the efficiency of the Department of Justice. *Phillips v. Bergland*, 586 F2d 1007 (Ct.App. 4th Cir. 1978).

As previously stated, with the exception of an incident involving a bear hug of a female employee, all of the complaints against Appellant took place while off duty or not employed by Respondent. The equation of this off duty conduct by Respondent with what a person might do while on the job was improper and did not show the sufficient nexus to employment to permit dismissal of Petitioner because he was never shown to be abusive to prisoners in 20 years of service.

There was no showing that Petitioner would be abusive with male prisoners (which were people he supervised). In fact, his record indicated otherwise. Therefore, Respondent did not meet its burden and the decision of the Court of Appeals for the Federal Circuit was contrary and in conflict with the decisions of other circuits and such decision should be reversed.

II. The Decision Below Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

The question raised by this Petition, if not yet decided by the Court, should be. It is an important question of federal law which impacts substantially upon the body of federal law particularly in the area of protection of federal employment.

One of the questions presented to the Court of Appeals for the Federal Circuit was whether the Respondent could bring up allegations of misconduct which were more than five (5) years old and where there had been two (2) intervening dismissals in which these allegations were not mentioned. At his hearing before the Merit Systems Protection Board, Petitioner objected to these allegations that took place in 1979 as being barred by staleness and laches. This was overruled and these allegations were used in sustaining Petitioner's dismissal.

It has been held that an employee is barred by laches for waiting to bring a complaint. *Haas v. Overholser*, 223 F2d 314 (D.C. App. 1955). In this case the allegations against Petitioner took place in 1979, and involved alleged improper advances toward female co-workers which took place off duty and the giving of a bear hug to a female employee while on duty. The complainants testified they had reported the incidents to their superiors. Further, it was established that there had been two (2) intervening hearings on the Respondent's attempt to discharge Petitioner and these 1979 allegations were not mentioned.

However, the Merit Systems Protection Board and the Court of Appeals for the Federal Circuit permitted

these allegations to stand and form a basis for Petitioner's dismissal.

It is an essential element of fundamental fairness and due process of law that an individual be given the best opportunity to defend the allegations against him permitting the Respondent to ignore these allegations for more than five (5) years and then bring them up, when as Petitioner testified, he could not recall the incidents because of the passage of time, violated fundamental fairness and due process of law as guaranteed by the Fifth Amendment to the United States Constitution. To permit this puts the Petitioner at a substantial disadvantage and gave Respondent an unfair advantage. Because the doctrine of laches should be applicable to the Government as well as to the employee, the decision of the Court of Appeals for the Federal Circuit should be reversed. This constitutes an important question of federal law and should be decided by this Court.

CONCLUSION

For the reasons stated, the Petition should be granted.

Respectfully submitted,

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APPENDIX

NOTE: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-3270

WELDON L. WADE,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

DECIDED: November 23, 1987

Before NEWMAN and BISSELL, *Circuit Judges,* and COWEN, *Senior Circuit Judge.*

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board ("Board"), No. SL07528610232 (May 7, 1986), affirming the decision of the Department of Justice (the "agency") to remove Weldon L. Wade from his position as Correc-

tional Officer at the U.S. Medical Center for Federal Prisoners in Springfield, Missouri, for misconduct, dishonesty, and sexual harassment is *affirmed.*

OPINION

Wade first argues that the agency failed to establish a nexus between his removal and "either the employee's ability to accomplish his . . . duties satisfactorily or some other legitimate governmental interest promoting the 'efficiency of the service.'" Brief of Petitioner, page 22 (quoting *Doe v. Hampton,* 566 F.2d 265, 272 (D.C. Cir. 1977)). This argument is without merit. Clearly, the removal of a correctional officer who has been shown to be dishonest and, as the AJ stated, "has demonstrated a sustained tendency to seriously abuse weaker or helpless people who are under his control. . ." benefits the efficiency of supervising federal prisoners. John D. Brush, the agency's deciding official, explained that honesty and integrity of each prison staff member was critical to the organization's success. Warden Petrovsky reiterated this view.

The AJ found that Wade made numerous intentional and material misstatements and omissions on various employment applications and falsified his back pay claim. These findings alone support the conclusion that Wade exhibited a lack of credibility that would adversely affect the efficiency of the service. In addition, however, it was demonstrated that Wade engaged in a pattern of abusive conduct toward weaker individuals or individuals wholly under his control, assaulting three female employees and two female patients. The AJ was justified in deeming such conduct by a correctional officer inappropriate. Accordingly, substantial evidence supports the

AJ's conclusion that the employee's misconduct is likely to have an adverse effect upon the agency's functioning. *See Mings v. Department of Justice,* 813 F.2d 384, 389-90 (Fed. Cir. 1987) (citing *White v. United States Postal Serv.,* 768 F.2d 334, 335-36 (Fed. Cir. 1985); *Brown v. Department of Transp., FAA,* 735 F.2d 543, 547 (Fed. Cir. 1984)).

Wade next argues that the Board's decision was not supported by substantial evidence. More specifically, Wade states that the AJ "completely disregarded [his] explanation of events and the reason they took place. If she had not done this, then there would not have been sufficient evidence to sustain her decision." However, the AJ placed less reliability on Wade's version of the events due to his past inconsistent statements and his demeanor at the hearing. This court has repeatedly held that such credibility determinations are "virtually unreviewable. . . ." *Hambsch v. Department of Treasury,* 796 F.2d 430, 436 (Fed. Cir. 1986) (citations omitted).

Wade last argues that the penalty of removal was excessive. As we have consistently held, however,

> the court cannot and will not disturb a penalty unless it is unauthorized or exceeds the bounds of reasonableness because it is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion, or where the record is devoid of any basis demonstrating reasonableness.

Dominguez v. Department of Air Force, 803 F.2d 680, 684 (Fed. Cir. 1986) (citation omitted). Having carefully considered the record in the present case, we find no lawful ground upon which to disturb the penalty imposed by the agency.

In conclusion, we *affirm* since we do not find the decision arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or obtained without procedures required by law, rule, or regulation having been followed, or unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1982).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS REGIONAL OFFICE

DOCKET NUMBER SL07528610232

WELDON L. WADE,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

Peggy J. Seaman Presiding Official

INTRODUCTION

Appellant filed a timely petition for appeal from the agency's action in removing him from the position of Correctional Officer at the U.S. Medical Center for Federal Prisoners in Springfield, Missouri, effective February 10, 1986. As a non-probationary employee in the competitive service, appellant is entitled to appeal the removal action to the Merit Systems Protection Board (the Board). 5 U.S.C. §§ 7511(a)(1)(A); 7512; 7701(a).

For the reasons set forth below, the agency's action is AFFIRMED.

BACKGROUND

The agency initially suspended appellant from his position effective February 29, 1980, and removed him effective

March 22, 1980. Appellant successfully appealed those actions to the Board, and they were reversed. The agency removed appellant again effective March 18, 1983, and the Board once again reversed the agency's action.[1] At the hearing I convened in connection with the instant removal action appellant contended, and the agency conceded, that he had not been permitted to resume his duties at any time since he was initially suspended in 1980.[2] Appellant obtained other employment while appealing the prior removal actions: at Joan's Mixed Drinks (Joan's) from July to October, 1981; at White Chapel Cemetery from September to October, 1981; as a Nursing Assistant at Ellis Fischel State Cancer Center (Ellis) from October 16, 1981 to May 9, 1982; and, at the Missouri Training Center for Men at Moberly (Moberly) from September 1983 to September 1984. Other facts pertinent to this appeal are that appellant was arrested for rape in January 1980, and murder in October 1980, and was acquitted of those charges, following jury trials, in September 1981.

ANALYSIS AND FINDINGS

Due to appellant's lengthy absence from duty, the agency was required to conduct a background or security investigation before returning him to his duties. *See* Agency

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[1] *See Wade v. Department of Justice*, 12 M.S.P.R. 398 (1982); Initial Decision following remand, MSPB Docket No. SL075209061 REM, July 30, 1982; *and*, MSPB Docket No. SL07528310148 (April 2, 1984).

[2] Appellant received back pay, however; and, when returned to duty pursuant to the Board's orders, was assigned to remain in his home in a pay status. Appellant now argues that the agency contemptuously refused to abide by the Board's orders, and was determined to terminate him. At all times, however, appellant had the right to petition for enforcement under 5 C.F.R. § 1201.181 if he was not satisfied with the agency's compliance.

Exhibits 5 and 6 (agency regulations which require investigations of employees who have a 12-month or longer break in service, and encumber sensitive positions); testimony of Mr. Faustino Pino, a headquarters agency official with oversight of personnel security; *and,* testimony of Inspector Greg Hershberger. The agency's current charges stem from the investigatory findings. The charges are that: (1) appellant engaged in misconduct at Ellis, was removed for that misconduct, and the removal action was affirmed on appeal;[3] (2) appellant made false entries and committed material omissions on his employment application forms for Ellis and Moberly; (3) appellant made a material omission on a back pay claim, resulting in the agency's overpayment to him of $160.00; and, (4) appellant forced his attentions on three female agency employees in 1979 and 1980, prior to his first removal, thus demonstrating, in this charge as well as in charge (1), a "pattern of abuse towards individuals who are smaller and weaker than [himself] . . . or who are under [his] control."

As to charge (1), appellant was removed from Ellis for physical mistreatment of two female patients. Appellant does not dispute that the acts essentially occurred. First, in February 1982, appellant was discovered sitting on the bed of a female patient. The patient's gown had been pulled aside, exposing her breasts and abdomen, and appellant was preparing to give her a "chest massage." There were no doctor's orders for the procedure, and a chest massage was not, and is not, a medically recognized procedure. *See* testimony of the agency's general sur-

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[3] *See* appeal decision rendered by the state of Missouri after an evidentiary hearing in which appellant was represented by counsel, Appeal File (AF), Tab 4(16).

geon, Dr. James W. Clawson. Appellant stated to Ms. Sharon Krumm, R.N., Director of Nursing at Ellis, that he had performed the procedure several times, at the patient's request, to ease her pain. After the incident, two registered nurses counselled appellant against using unauthorized procedures on female patients, and for failing to report a patient's pain.

Thereafter, on May 8, 1982, appellant massaged a 55-year old terminally ill cancer patient, Mrs. Wendling.[4] The patient, who died the next month, in June, prepared a written statement on May 10, 1982. AF, Tab 4(13). In addition, R.N. Krumm testified that Mrs. Wendling had reported the incident to her the next day. At the time of the incident, Mrs. Wendling had a number of tubes attached to her. AF, Tab 4(14). For medical reasons, the hospital was unable to give her sufficient medication to ease her pain. Testimony of R.N. Krumm.

R.N. Krumm recounted that the day after the massage, Mrs. Wendling came to her "very upset and frightened," seeking reassurance that she would have no further contact with appellant. R.N. Krumm had her prepare the written statement. According to Mrs. Wendling's account to R.N. Krumm, and her written statement, appellant came into her room and began to massage her, although Mrs. Wendling had told him that she did not want him to. He eventually massaged her in the genital area. She asked him to stop, but "didn't want to make him mad because [she] didn't know what he would do." She stated that he "asked me didn't that feel good." She had her ex-husband stay with her in case appellant re-

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[4] Since Ms. Norma Cooke, Personnel Director at Ellis, testified that Mrs. Wendling was 55, I discount the indications in the investigatory documents that she was 80 years old.

turned, which appellant did later that evening. When he returned, appellant reportedly asked if she wanted a back rub, and asked, further, "didn't that feel good when I was rubbing you this afternoon."

Appellant claims that his massage of Mrs. Wendling was not against her wishes; and, that he did not massage her in the genital area. These claims are flatly contradicted by Mrs. Wendling's account, and are refuted by R.N. Krumm's testimony that Mrs. Wendling was upset, frightened, and wanted appellant kept away from her. I find that if Mrs. Wendling had wanted the massage and had not been massaged in the genital area, she would have had no reason to report to R.N. Krumm, and prepare the written statement.

Appellant surmised that Mrs. Wendling may have made up her story in order to keep her ex-husband with her, because she was dying, and was "maybe scared." Not only do I find this conjecture unlikely on its face, but Ms. Cooke testified that Mrs. Wendling had been divorced for many years and had no desire to reunite with her former husband. She also testified that Mrs. Wendling was a religious person. I find it unlikely that a religious person, knowing she was dying, would make up such a serious lie. Finally, for reasons I will address throughout this decision, I find appellant a less-than-credible witness. I find, as did the state of Missouri upon appellant's appeal, that the evidence supports Mrs. Wendling's version of the massage.[5] I also find that the sustained

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[5] Appellant's current wife, Mrs. Rosa Lee (Dudley) Wade, testified that she had been a Nursing Instructor while appellant was employed at Ellis, and had heard no reports of his abusing female patients. This is somewhat unlikely since Ellis's procedures

(Continued on following page)

specifications of charge (1) do constitute physical mistreatment of patients, as the agency alleges, and charge (1) is SUSTAINED. 5 U.S.C. § 7701(c)(1)(B).

As its second charge, the agency specified numerous alleged instances of material omissions, misstatements, and falsifications appellant made in his applications for employment at Ellis and Moberly. The record contains copies of the application forms, AF, Tabs 4(7) and (18), and appellant did not dispute that he had filled them out as the record copies show he did. In addition, appellant testified that he had "fudged" the applications so as to obtain employment.

In some instances, appellant offered an explanation of his answers. As to one, in June, 1981, appellant answered "no" as to whether he had ever been convicted of any law violation or was now under charges for any offense other than minor traffic violations. Although he was under pending rape and murder charges at that time, he stated that he knew that he would be acquitted by the time he would begin the job at Ellis. This explanation does not make appellant's negative response any less untrue at the time it was made. He also explained that he had not told Moberly about his employment at Ellis because retroactively, he should have been in his position as Correctional Officer at the agency, having had his removal action reversed, and he "couldn't be in two places at once." However, since the one place he actually was at the time was Ellis, his contrary informa-

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Footnote continued—

concerning nursing assistants' administration to patients of the opposite sex were changed due to appellant's misconduct. Testimony of R.N. Krumm; Agency Exhibit 1; AF, Tab 4(27). *See also*, AF, Tab 4(30).

tion was misleading. In addition, appellant claimed, not very convincingly, that he had read a question asking if he had ever been arrested *or* convicted, as to be one asking whether he had been arrested *and* convicted. At the hearing, appellant's demeanor was evasive, and his responses to questioning were often mumbling and rather monosyllablic. In view of appellant's admission that he "fudged" the applications and personnel forms, and due to the lack of credibility I find in his testimony on the basis of his "fudging," his demeanor, and the other charges I find sustained herein, I find that appellant intentionally made the false statements and omissions. *See Coulter v. Department of the Navy,* 12 M.S.P.R. 431 (1982).

In addition, appellant's misleading responses were material, since hiring officials at Ellis and Moberly testified that they would have investigated further or not hired him if they had known appellant had been previously terminated for cause, and would not have hired him if they had known he had been arrested for rape and murder. *See* testimony of R.N. Krumm, Ms. Cooke, and Mary Burnett, Personnel Clerk at Moberly. In addition, these witnesses testified that in their facilities, falsification of employment applications would be grounds for the employee's termination. Such is also true in federal service. *Dunbar v. Department of the Treasury,* 6 M.S.P.R. 100 (1981). Appellant's admission that he "fudged" his answers shows, moreover, that the matters were material in his mind.

Appellant raised a defense of "coercion," as to charge (2), in that he would not have had to seek other employment if the agency had not twice removed him. This does not meet the legal test for coercion, however. *See Frue-*

hauf Southwest Garment Co. v. United States, 111 F. Supp. 945 (1953). Moreover, the mere fact that one is unemployed due to a removal action, whether there was merit to the action or not, does not entitle one to deceive potential employers. Charge (2) is supported by a preponderance of the evidence, and is SUSTAINED. 5 U.S.C. § 7701(c)(1)(B).

The facts underlying charge (3) are undisputed, and the issue therefore concerns appellant's intention when he completed his application for back pay from the agency (based on the prior, reversed removal actions.) *See* AF, Tab 4(15). That is, appellant worked at Joan's Mixed Drinks from July to October, 1981, to pay off a debt for bartending lessons and a bar tab. He testified that he did not report this employment to the agency, because no money changed hands. Therefore the agency overpaid him by approximately $160.00, the value of the salary he earned to repay the debt. *See* testimony of the bar owner, Ms. Joan Hennis. Income obtained from the discharge of indebtedness is reportable as gross income. *See* 26 U.S.C. § 61(a)(12); testimony of the agency's Comptroller, Mr. Virgil Elliot.

Although appellant claims he was unaware that the liquidation of a debt was to be reported as gross income, he did report his employment at Joan's to Ellis when he applied there. AF, Tab 4(7). It therefore appears that appellant would report his employment at Joan's when it would benefit him to do so, and not when it would be to his detriment. If in doubt, he could have informed the agency of the circumstances of his employment at Joan's so that the matter could be determined. I find that appellant intentionally chose not to do so, in order to obtain the value of the salary he earned

at Joan's, again from the agency. *Coulter, supra.* This charge is supported by a preponderance of the evidence, and it is SUSTAINED.

Finally, the agency alleged in charge (4) that appellant had abused fellow employees while employed with the agency in 1979-1980. Appellant, who has been subjected to two removal actions and appeals since that time, now pleads laches and staleness as to these charges. The Board has held that a mere delay in bringing charges does not necessarily bar an agency from taking action upon them. If an investigation turns up events, a subsequent, prompt action is not invalid unless there is actual prejudice to an appellant's rights, or to his ability to defend against the charges. *See Cates v. Department of Agriculture,* 24 M.S.P.R. 468 (1984); *Wilkes v. Veterans Administration,* 6 M.S.P.R. 732 (1981). The Board has also found that an agency's inclusion of five-year-old events is not improper where most of the specifications are current, and the older ones serve the purpose of demonstrating that the employee had engaged in a pattern of misconduct over a substantial period of time. *Deatrick v. Department of the Treasury,* 10 M.S.P.R. 262 (1982).

In this case, appellant responded "yes" to his representative's leading question as to whether the passage of time had prejudiced his ability to remember and defend against the charges. I am not convinced on this point, however. There are three women involved in the charges: Licensed Practical Nurse (LPN) Judy Burks, Correctional Officer Karin Fearl, and LPN Vicki Younger. Appellant testified that he did recall the incident involving Ms. Younger, but not the ones concerning the other two. *See also,* appellant's statement to Investigator Hershberger, AF, Tab 4(32).

As to Ms. Fearl, appellant stated in his affidavit, *id.*, that he knew who Ms. Fearl was, and had never given her a "bear hug," as alleged by the agency, or done anything with her which she objected to, "to the best of [his] knowledge." At the hearing, however, appellant testified that he did not recall ever knowing Ms. Fearl. On the basis of appellant's prior inconsistent statement and the lessened degree of credibility I attribute to his hearing testimony generally, I find that appellant does remember Ms. Fearl, and remembered her well enough to defend against the agency's charge when he wrote his affidavit.

As to Ms. Burks, appellant maintains that he may have given her a motorcycle ride, as she claims, but does not remember the charged incident. He does not maintain that he did not commit the charged offense, or that he would not engage in such behavior - he only pleads a lack of specific memory. In view of the nature of the offense (apparently, attempted rape) and the continuing attention he allegedly paid to Ms. Burks following the incident, I find that a reasonable person would remember whether or not he had engaged in such conduct. I conclude that appellant remembers the specifications of charge (4) well enough to defend himself against them.

There is also the issue, however, of whether the agency did in fact first learn of these allegations in its recent investigation, and thus, act "promptly" upon learning of them.[6] Each of the complainants maintains that she did report the incidents to someone between 1979 and 1982;

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[6] On this issue, I note that had appropriate agency officials known of these specifications at the time that it initially removed appellant upon the charge of rape and incest in 1980, the agency would have been very likely to cite them in order to bolster the credibility of its chief witness, and its case.

either to Ms. Jane Tyndall, who was a head nurse at the time, or to Ms. Pawnee Creson, who was a former Director of Nursing. Ms. Creson testified that only Ms. Burks reported to her, in 1982, and asked that she keep the information confidential because she was frightened since at that time, it was possible appellant would be returning to the agency. Ms. Creson testified that she honored Ms. Burks's request to keep the information confidential. Ms. Tyndall was not a witness at the hearing, and neither Ms. Fearl nor Ms. Younger was aware of what action she may have taken upon their reports. I find no indication that officials within appellant's supervisory or disciplinary chain of command were aware of these specifications prior to the investigation. Further, I find it highly unlikely that responsible agency officials would have continued to pay appellant to stay at home, taking no action, if in fact, they had been aware of these allegations. I conclude that charge (4) is not invalid on the basis of laches or staleness.

I will therefore address the merits of the specifications of charge (4). As to the first, the agency alleged, and and Ms. Burks presented forthright and unrebutted testimony, that in 1979, after she agreed to go on a motorcycle ride with appellant after work, appellant drove her to Springfield Lake.[7] Despite Ms. Burks's stated desire to continue with the ride, he stopped there, began kissing her, placed his hands under her blouse and on her crotch, tried to place his hand inside her pants, and placed her hand on his crotch with the comment, "see what you

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[7] Ms. Burks explained that she was a motorcycle buff, and had just sold her motorcycle. She testified that she was interested in the motorcycle ride only, and was in no way sexually interested in appellant.

do to me." Despite her resistence, appellant did not stop until a storm arose, at which time he did return her to her car, but continued to proposition her. According to Ms. Burks's affidavit, AF, Tab 4(23), she is "sure that had the storm not come up, Weldon Wade would have forcibly raped me."[8]

Then, after appellant was arrested for murder in 1980, he called Ms. Burks at her home and asked if he could stay with her, which request was "flatly refused." Then, upon learning that Ms. Burks's mother lived with her, appellant reportedly asked Ms. Burks if her mother "needed someone to bunk with." He called again on a later occasion, requesting that he and Ms. Burks meet and talk. Ms. Burks testified that while she made it clear to appellant in these conversations that she wished to have nothing to do with him, she was fearful of angering him due to what she considered his violent nature. Since I find Ms. Burks's testimony credible and unrebutted, I conclude that the preponderance of the evidence supports these specifications.

Next, the agency alleged that appellant gave an unwanted "bear hug" to Ms. Fearl while they were both on duty. Ms. Fearl testified that in 1979, she wanted to see a ward which was being remodeled. Since appellant had the key, she went downstairs to the ward with him. There was no one else on the ward at the time, and appellant allegedly grabbed her in a "bear hug" from behind. She reportedly told him not to touch her, he released her, and she returned to her ward. Again, I find this tes-

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[8] Even if Ms. Burks is mistaken in this conjecture, appellant's action in placing a co-worker into a situation giving rise to such a belief is itself abusive behavior.

timony credible and unrebutted, and this specification is supported by a preponderance of the evidence.

The deciding official, Warden Joseph S. Petrovsky, testified that while in itself a "bear hug" may be considered an act of harmless horseplay, in this case, the incident is serious due to its isolated setting. I find it is yet another example of appellant's pattern of physically mistreating a weaker person who is alone and under his control. Moreover, since Ms. Fearl immediately reported the incident to her "charge nurse," Ms. Tyndall, she evidently did not consider the event to be horseplay.

The final specification of charge (4) is described differently by appellant and by the complainant, Ms. Younger. According to Ms. Younger's deposition, Agency Exhibit 3, in 1979, on the occasion of her birthday, she and a group of co-workers went to a steakhouse after work, to celebrate. She left her car at the agency and rode there with appellant and a female co-worker. She claimed that she did not pay attention to appellant at the restaurant, as she was at a large table and he was "just [her] transportation." She also noted that he was old enough to be her father. Afterwards, the third person did not ride with appellant and Ms. Younger. Instead of returning Ms. Younger to her car, appellant drove her in the opposite direction, to Springfield Lake. Appellant testified that while there, Ms. Younger kissed him a couple of times and then, all of a sudden, wanted to go home. In his investigatory affidavit, appellant stated that he "didn't listen fast enough," so Ms. Younger shoved him. Appellant testified that he then took her to pick up her children at their babysitter's home, and then to her home. He claimed that Ms. Younger invited him in and gave him some coffee, and that he then left.

Ms. Younger stated that she had been "very scared" when appellant began driving in the wrong direction, and had tried to dissuade him from doing so. She maintained that she did not kiss or embrace appellant. Rather, she stated that when he parked at Springfield Lake, he began trying "to strangle or kill" her, and would not stop until she bit his ear hard enough to make it bleed. She added that appellant then returned her to her car. She denied that appellant picked up her children and took her home, and that she invited him in for coffee. In addition, she refuted appellant's testimony that she had been "tipsy" and in no condition to drive, by stating that she had had only one drink.

Even under appellant's version of the incident, I find it unlikely that appellant would have taken Ms. Younger home rather than to her car, picked up her children, and been invited in for coffee. In addition, appellant was not convincing in demeanor when relating his story. Since appellant and Ms. Younger were not in close proximity with each other in the restaurant (which he refers to as a bar), I also find it unlikely that he would notice she was having "two rum and cokes everytime [he] drank a beer." The *modus operandi* is similar in the Burks and Younger incidents, in that each was taken to Springfield Lake and assaulted, rather than transported as was expected. I find that Ms. Younger's deposition is entitled to more credibility than appellant's testimony is, and this specification is supported by a preponderance of the evidence. Charge (4) is SUSTAINED.[9]

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[9] Warden Petrovsky noted that if one of the false statements appellant had made on one of his employment applications had in fact been true, *i.e.*, that as a Correctional Officer at the agency he had supervised three nurses, then it would have been a breach of agency policy for him to "socialize" with the LPN's, as they would have been his subordinates.

Warden Petrovsky testified extensively as to his reasons for taking the removal action. Essentially, he stated that Correctional Officers perform the most important role in the facility, having direct control over the inmates' activities. They must be worthy of trust, both as to their treatment of the inmates, and as to their credibility. In his testimony, appellant conceded that Correctional Officers are often alone with the inmates, and that it is necessary for Correctional Officers to be credible in light of frequent inmate allegations of improper treatment from them. Warden Petrovsky also explained that credibility and integrity of the staff is vital in a prison setting, so that the facility is run with organization rather than chaos.

On the basis of Warden Petrovsky's testimony and the record as a whole, I find that appellant has demonstrated a sustained tendency to seriously abuse weaker or helpless people who are under his control; that he has been repeatedly dishonest and is thus not credible and trustworthy; and, that he is willing to disregard directives, organizational procedures, and basic human rights. These traits directly counter the high standards of conduct, responsibility, integrity, good judgement, and maturity required of law enforcement officials. Moreover, the misconduct sustained herein is such that no reasonable person could expect would go undetected. Therefore, I find that appellant is unable or unwilling to conform his conduct to what is required of him. Discipline and self-control are vital to the position. Thus I find that the agency's action was taken for such cause as will promote the efficiency of the service. 5 U.S.C. § 75123(a); *Hickman v. Department of Justice*, 11 M.S.P.R. 153 (1982); *Barnhill v. Department of Justice*, 10 M.S.P.R. 378 (1982).

Appellant claims that removal is too harsh a penalty, in light of the 20 years of good performance he had with the agency prior to his first removal. He also states that he would be willing to relocate to another facility. Since his initial removal, however, appellant has not demonstrated that he has rehabilitated himself and acquired integrity. Rather, the abuse of defenseless women he engaged in at the agency continued at Ellis, even after he had been reprimanded. I also find that appellant's mistreatments of female co-workers created "an intimidating and offensive work environment which had serious adverse effects on their working conditions." *See Carosella v. U.S. Postal Service,* MSPB Docket No. DE07528310056 (February 20, 1986). Moreover, the dishonesty demonstrated by appellant's employment falsifications and back pay claim was still evident at the hearing. Although appellant called former co-workers as character witnesses, those witnesses were not aware of the current charges, and indicated that they would not want to work with a Correctional Officer who was shown to be abusive and noncredible. Also, Warden Petrovsky convincingly explained, in detail, why any one of the four sustained charges would be serious enough to warrant removal, "even if he had been 5 days away from retirement," due to the duties and requirements of the position. There is no reason why the agency should be required to place an unsuitable Correctional Officer into another facility. In fact, the agency would be dangerously derelict in doing so. I find that the penalty of removal does not exceed the bounds of reasonableness. *See Weiss v. U.S. Postal Service,* 700 F.2d 754 (1st Cir. 1983); *Douglas v. Veterans Administration,* 5 M.S.P.R. 280 (1981).

DECISION

The agency's action is AFFIRMED.

REVIEW RIGHTS

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on June 11, 1986, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§ 1201.113-117. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing a petition for review with:

Office of the Clerk
Merit Systems Protection Board
1120 Vermont Ave., N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. § 1201.114 of the Board's regulations. The parties should note that, effective August 1, 1985, they are now required to serve any petition for review and any subsequent pleading on all other parties. For additional information, see 50 Federal Register 28895 (July 17, 1985) (to be codified at 5 C.F.R. § 1201.114). The petition for review must be filed on or before June 11, 1986, and must set forth objections to the initial decision, supported by references to applicable laws, regulations, and the record.

Any appellant adversely affected or aggrieved by a final decision of the Board may file a petition with the United States Court of Appeals for the Federal Circuit, if the Court has jurisdiction. 5 U.S.C. § 7703. A petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be

received by the Court within 30 days after the Board's decision becomes final. Petitions must be sent to:

U.S. Court of Appeals for the
Federal Circuit,
717 Madison Place, N.W.,
Washington, D.C. 20439.

For the Board:

/s/ Peggy J. Seaman
Peggy J. Seaman
Presiding Official